No. 93-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITIONER'S REPLY MEMORANDUM

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1. The Record Contains No Issues of Fact.

In initiating and pursuing this action, the respondents deliberately took a procedural course that required no resolution of any factual disputes. They challenged the New York statute "on its face," and they moved for summary judgment. This Court considered the facial constitutionality of a federal statute -- the Adolescent Family Life Act -- in *Bowen v. Kendrick*, 487 U.S. 589 (1988), and noted, in that case, the distinction between a facial challenge and an attack

based on how the law is applied. 487 U.S. at 600-602. As a result of the way the litigation has been structured, there are no factual disputes in this record that require resolution. The constitutional issues are pristinely presented.

The respondents invert the burden of proof when they assert, most remarkably, "Claims the School District is presently operating in a secular manner constitute an 'as applied' argument not properly before this Court." Br. in Opp., p. 2. *Bowen v. Kendrick, supra*, established that a court confronted with a facial challenge to a statute that authorizes only secular activity must presume, in the absence of evidence to the contrary, that the statute is being administered "in a secular manner." It is simply erroneous to say that a public school district must affirmatively "claim" that it is operating in a secular manner and that such a "claim" may be made only in an "as applied" challenge.

2. Disparagement of Satmar Beliefs Is Irrelevant.

Although they lack evidentiary support in this record, the respondents seek to besmirch the Satmar Hasidim by associating them with practices that seem strange and unacceptable in the modern world. The Brief in Opposition contains a parade of dubious factual assertions, snatched from other litigations involving the Satmar Hasidim and from affidavits filed by the respondents that were contested in the trial court and in the appellate courts of New York and were not, therefore, the basis for the entry of summary judgment. [1]

[1] Several irrelevant legal issues are also inserted confusingly into the Brief in Opposition. Respondents' claims that Chapter 748 "contravene[s]" the Master Plan for School District Reorganization in New York State (Br. in Opp., pp. 12-13) and is "in conflict with" Article 81 of the New York State Education Law authorizing "special act" school districts (Br. in Opp., p. 13) are of no conceivable relevance. Likewise, respondents' lengthy analysis of the Individuals with Disabilities Education Act (Br. in Opp., pp. 14-15) sheds no light on the constitutional issue before this Court. And respondents' disputed statistics on the enrollment history of the Kiryas Joel public school (Br. in Opp., p. 3) have no bearing on the Establishment Clause issue presented by the petition and were, in any event, contested by petitioner in affidavits submitted to this Court on petitioner's successful application for a stay.

Particularly irrelevant is respondents' detailed discussion of the purpose and operation of Satmar religious schools (Br. in Opp., p. 12). These schools are not at issue in this case, and respondents' discussion of them appears to be a misguided attempt to confuse the issues and prejudice this Court against Satmar religious beliefs. And the fact that the Kiryas Joel Village School District -- like the Monroe-Woodbury School District before it -- provides transportation services and textbooks to children attending the religious schools which "serve as the vehicle for inculcating in Satmar children the religious standards of their parents" (Br. in Opp., p. 11) makes this school district no different from thousands of others across the country that provide secular services to religious schools in their jurisdiction.

3. The Record Supports a Secular Motive.

Respondents are confused as to why the parents of Kiryas Joel removed their disabled children from the Monroe-Woodbury public schools. Dissenting in the Appellate Division, Justice Levine (who was recently promoted to the New York Court of Appeals) explained (Pet. App. 76a-77a):

> It bears emphasis that we are reviewing a determination that chapter 748 is facially

invalid, made by Supreme Court in granting plaintiffs' motion for summary judgment. . . . [W]e are bound to look at chapter 748 as a response to the *stated* position of the Satmar sect, expressed not only in sworn affidavits here but consistently throughout the dispute over special educational services for its handicapped children (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 NY2d 174, 180 n 2, 189, *supra*). As repeatedly stated, the motive for the Satmarer parents' refusal to accept the special educational services for their handicapped children offered by the Monroe-Woodbury District was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village that were inadequately addressed by the professional staff of the Monroe-Woodbury District.

Justice Levine's description of the parents' motive as "not religious" conclusively refutes the respondents' assertion that the principal reason for maintaining a public school in Kiryas Joel is a "religious tenet of separatism," and that our denial that such a "tenet" exists was raised "for the first time during oral argument before the Court of Appeals." Br. in Opp., p. 2 n. 1.

4. Separatism, Whether Religious or Secular, Is Permissible.

We noted in our petition that the questions presented by this case do not depend on the details of the Satmar Hasidic credo. Pet. 5 n. 1. There is no dispute that many Satmar Hasidim choose to live in a community with others

who share their religious beliefs, and that the utility of a separate public school district for the disabled children of Kiryas Joel relates, in part, to the fact that the children are reared in this environment. This Court's opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), makes clear that it is constitutionally proper and permissible to accommodate religious tenets prescribing separatism. *See* 406 U.S. at 210 (central to Amish faith is "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence"). Although total separatism is not demanded by any Satmar religious tenet, Satmar religious observance and the preservation of social and religious values are furthered by separatism. Under *Yoder*, it is clearly permissible to accommodate needs that grow out of this way of life.

Respondents' contention that the primary effect of Chapter 748 is "to involve the state in sponsorship of Satmar separatist precepts" (Br. in Opp., p. 21) conflicts with the *Yoder* Court's conclusion that "[a]ccommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. . . . Such an accommodation 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" 406 U.S. at 234-235 n. 22 (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

5. *Wisconsin v. Yoder* Is Applicable.

The respondents' discussion of *Wisconsin v. Yoder, supra* (Br. in Opp., pp. 22-23), rests on several erroneous premises. *First*, we do *not* contend that the Free Exercise Clause, in and of itself, confers on petitioner a right to an

independent public school district congruent with the Village of Kiryas Joel. The issue is not whether the School District *must* be created; it is whether the creation of the School District is a *per se* violation of the Establishment Clause. The Free Exercise Clause is, we submit, relevant because the legislature may take Free Exercise values into account in determining how to resolve the problems of educating the disabled children of Kiryas Joel. *Second*, the respondents describe the Satmar Hasidim pejoratively as religious fundamentalists who draw cultural boundaries between themselves and the rest of society and subject themselves unquestioningly to the "authority" of a rabbinical leader. By contrast, the "Amish agrarian way of life, essential to the physical survival of the community" (Br. in Opp., p. 22), is favorably described. [2] Respondents ignore the observations of this Court regarding the Amish that apply fully to the Satmar Hasidim (406 U.S. at 223-224):

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

[2] The strict religious practices of the Amish, as described in expert testimony in *Yoder*, parallel the practices of Satmar Hasidim that the respondents treat with derision. *Compare* Br. in Opp., p. 12 ("Satmar religious schools 'serve . . . as a training ground for Torah knowledge in the case of boys, and in the case of girls, as a place to gather knowledge they will need as adult women'") (citation omitted); Br. in Opp., pp. 3-4 ("teachings of the Torah and the Talmud . . . serve to guide every aspect of life from dress to diet;" "[t]he Rebbeh oversees almost every aspect of Hasidic life"), *with Yoder*, 406 U.S. at 211 (informal Amish education emphasizes "the specific skills needed to perform the adult role of an Amish farmer or housewife"); 406 U.S. at 216 ("the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community").

Indeed, the *Yoder* Court noted that "idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." 406 U.S. at 226.

Finally, the respondents erroneously minimize the accommodation required in *Yoder* as "merely involv[ing] the exemption of Amish children from compulsory attendance requirements so that they could be educated" in the Amish ways (Br. in Opp., p. 22). Justice Douglas focussed in his partial dissent in *Yoder* on the individual interests of the Amish children who were being deprived of an education that would enable them to live in the secular world. The effect of this Court's ruling in *Yoder* was to keep Amish children insulated from the outside world by permitting their parents to terminate their formal education at an early age. The statute challenged in this case has the opposite result. The disabled Satmar children attending public school classes in the Kiryas Joel Village School District are learning secular skills that will enable them to function in the outside world. If the decision below is upheld and they are denied these tools, their lifetime exclusion from the outside world is virtually certain.

6. *Wolman v. Walter* Controls the Constitutional Issue.

Respondents complain that the Kiryas Joel public school is not analogous to a "neutral site" within the meaning of *Wolman v. Walter*, 433 U.S. 229 (1977), because it permits Satmar children living in Kiryas Joel to be educated "exclusively with other Orthodox Jewish children." Br. in Opp., p. 24. This Court clearly stated in *Wolman*, however, that the "nature of the pupils" (433 U.S. at 248) is not relevant to whether a site is "neutral" under the Establishment Clause. In the same vein, the *Yoder* Court observed that "[s]o long as compulsory education laws were confined to eight grades of elementary basic education *imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith*, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject." 406 U.S. at 217 (emphasis added). There was no suggestion that exclusively or predominantly Amish public schools would run afoul of the Establishment Clause. By the same token, the student population of the Kiryas Joel public school is not a basis for its constitutional invalidation.

7. The Availability of Alternatives Is Irrelevant.

Respondents' assertions that the parents of Kiryas Joel "could have" sought administrative review of their secular concerns (Br. in Opp., p. 21) and that the New York Legislature "could certainly have" taken alternative measures to resolve the conflict between the residents of Kiryas Joel and the Monroe-Woodbury school district (Br. in Opp., p. 26) miss the point entirely. The issue is not whether other actions could have been taken by the parties, the courts, or the legislature, but only whether the course that was chosen

by the State of New York through its legislature and executive -- the enactment of Chapter 748 -- violates the Establishment Clause of the United States Constitution.

8. This Is an Appropriate Case.

Finally, respondents' argument that certiorari should be denied because this case involves "unique factual circumstances" (Br. in Opp., p. 27) ignores the broad implications that this case has for Establishment Clause doctrine. A statute that authorizes no religious instruction or financial assistance to any sectarian institution has been struck down because its enactment is said to create a "symbolic union" between church and state. This is an extreme and unwarranted application of the second prong of the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and illustrates how injurious it is to maintain this constitutional standard.

Nor is it meaningful to say that this case involves a unique situation. In dealing with a constitutional subject as broad as religion, this Court confronts varying factual scenarios because of the diversity of religious beliefs and practices in our pluralistic society. Animal sacrifices, for example, and the ingestion of peyote during religious rituals are hardly common practices. Nonetheless, this Court did not refrain from considering and deciding constitutional issues affecting those religious observances. *See Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. 2217 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990).

Moreover, the procedural posture of this case -- a facial challenge litigated on undisputed facts -- makes it an ideal vehicle for the articulation of general principles applicable to other cases. This Court should grant certiorari

in this case to clarify the applicable constitutional standard. [3]

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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[3] Respondents also argue that certiorari should be denied because Chapter 748 violates the "purpose" and "excessive entanglement" prongs of the *Lemon* test (Br. in Opp., p.20). The majority of the New York Court of Appeals based its conclusion only on the "primary effect" aspect of the *Lemon* standard. In any event, Chapter 748 is clearly valid under the other two prongs for the reasons set forth in the dissenting opinions of Judge Bellacosa (Pet. App. 46a-47a) and Justice (now Judge) Levine (Pet. App. 75a-76a, 89a-90a).